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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL L. MATTINGLY - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

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February ____, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner will be Placed in Jeopardy Twice by the Kentucky Supreme Court's Decision that a New Trial is Permissible when Only Incompetent Evidence was Offered by the Commonwealth to Prove All of the Elements of a Persistent Felony Offender because it is Trial Error and Not a Case Where There was Not Sufficient Evidence to Sustain Verdict of Guilt.

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MICHAEL L. MATTINGLY, - - - *Petitioner,*

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COMMONWEALTH OF KENTUCKY - - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Michael L. Mattingly, respectfully prays that a writ of certiorari issue to review the judgment of The Supreme Court of Kentucky entered on December 18, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky reversed the opinion of the Court of Appeals of Kentucky entered on April 4, 1986. The Court of Appeals of Kentucky held that the Petitioner's Persistent Felony Offender conviction violated the double jeopardy provisions of Section 13 of The Kentucky Constitution and the Fifth Amendment to The United States Constitution. The opinion of the Court of Appeals of Kentucky is unpublished. (Appendix, hereinafter

A 1-5). The opinion of the Supreme Court of Kentucky affirming the Petitioner's Persistent Felony Offender conviction is not published as of this date. *Commonwealth* v. *Mattingly*, —— S. W. 2d —— (Ky. 1986) SUPREME COURT NO. 86-SC-288-DG, December 18, 1986 (A 6-12).

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on December 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Federal Constitution. The Fifth Amendment states in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The Fourteenth Amendment, Section One, states in relevant part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law. . . .

STATEMENT OF THE CASE

The Petitioner was indicted by the Pulaski County, Kentucky Grand Jury on August 23, 1984 for Receiving Stolen Property over $100.00, a violation of KRS 514.110 (Transcript of Record, hereinafter TR, 1). According to the indictment on or about the 1st day of

August, 1984, the Petitioner had in his possession the following property belonging to Tri-County Implement Company of Paris, Kentucky:

(a) 1976 tractor, trailer and U-haul, License #9LA-894 Ky., Serial #761081579;
(b) 1978 Edic, Serial #4044010278;
(c) 1978 5600 Ford tractor, Serial #C569084;
(d) 1978 3600 Ford tractor, Serial #C591413; and
(e) 1984 3910 Ford tractor, Serial #CC720842

all having a value of more than $100.00 (TR, 3).

Shortly thereafter, the Petitioner, on the 1st day of August, 1984, was again indicted by the Pulaski County, Kentucky Grand Jury and charged with the offense of being a Persistent Felony Offender in the First Degree, a violation of KRS 532.080 (TR, 2a). According to the indictment, the Petitioner committed the offense of Persistent Felony Offender in the First Degree by committing the offense of Receiving Stolen Property over $100.00 after having been previously convicted of a felony, to-wit: Attempting to Commit Robbery in the First Degree, Hardin Circuit Court, No. 76-5, sentenced to six (6) years on April 26, 1976 (TR, 22).

Trial began on March 20, 1985 (Transcript of Evidence, hereinafter TE, 2). The Commonwealth's first witness was Libby Poynter, who related that on August 1, 1984, she saw a tractor and trailer go by her house with three (3) Ford tractors on the back (TE, 62).

The Commonwealth's second witness was Dale Mink, who testified that he saw a U-haul truck go by his brother's house (TE, 70). Mr. Mink further testified that from a distance of 250 feet he saw the driver of the truck and that he had a trimmed beard and dark hair (TE, 73-74). On cross-examination, Mr. Mink testified that the U-haul truck which the Petitioner was driving was similar to the one he had seen (TE, 82) and he could not positively identify the Petitioner as the person he had earlier seen driving the U-haul truck (TE, 97).

The Commonwealth's third witness was William Ashley Welch, Jr., a/k/a Billy Welch. Mr. Welch was an employee of Cooper Brothers Chevron and he related that on August 1, 1984, he rented a 24 foot U-haul truck to the Petitioner and that he could not identify the Petitioner in the courtroom (TE, 108-110). Mr. Welch further testified that the U-haul truck had been returned to Cooper Brothers Chevron approximately one (1) week before the Petitioner rented the truck, that he had no knowledge whether the truck had been rented by anyone else during that period of time and that he did not look inside the bed of the truck the day the Petitioner rented the truck but that when he picked the truck up it had dirt tracks in it that looked like tractor tracks (TE, 113-114).

The Commonwealth's next witness was Roy G. Cooper, one of the owners of Cooper Brothers Chevron (TE, 126). Mr. Cooper testified that there was no debris in the truck prior to being rented and that mud

and dirt tracks were in the truck when it was returned (TE, 128-129).

The Commonwealth's next witness was Wilbur Hannah of Paris, Kentucky, owner of Tri-County Implement Company (TE, 151). He testified that three (3) tractors were taken from his dealership along with a 1976 white truck and Edic trailer (TE, 152-153).

The Commonwealth's next witness was Officer Kenny Upchurch, who testified that after he got the report of the stolen tractors, he looked in the back of the U-haul which the Petitioner was driving and saw dried tractor tracks (TE, 162). The Petitioner was placed under arrest about thirty (30) minutes later (TE, 164). He made a courtroom identification of the Petitioner (TE, 165). A Ford tractor key was found half-way between the driver's door and the end of the U-haul (TE, 166). The key was handed to him by Jim Richardson, a volunteer firemen (TE, 172).

The Commonwealth's next witness was Mike Walters, a detective with the Pulaski County, Kentucky Sheriff's Office and he testified that he took six (6) prints off of the tractor and trailer on August 1, 1984 and submitted them to the Kentucky State Police Laboratory in Frankfort, Kentucky (TE, 184-185). He further testified that he took some samples from the trailer and the rear bumper of the U-haul and they were turned over to Detective McWhorter of the Kentucky State Police (TE, 188).

The Commonwealth's next witness was Detective Jim McWhorter of the Kentucky State Police. He

testified that he received some debris samples and fingerprints from Detective Walters (TE, 194).

The Commonwealth's next witness was Detective Karl Clinnard, an orthodontist, and a detective with the Pulaski County Sheriff's Department. He took plastic cast of footprints from the Elrod community and from Mr. Goldson's residence (TE, 196). Detective McWhorter sent the cast to the Kentucky State Police Lab in Frankfort, Kentucky (TE, 198). Detective Clinnard further testified that he took full foot impressions but that the impressions did not match the Petitioner's shoe print (TE, 200).

The Commonwealth's next witness was Doug Silvers, a detective with the Pulaski County Sheriff's Office. He took soil samples from the side of the creek in the Elrod community right next to a flat bed trailer and a second sample from a U-haul that the Petitioner occupied (TE, 204).

The Commonwealth's next witness was Barbara Wheeler from the Kentucky State Police Crime Lab. She received, a shoe, plaster cast, soil sample from around a truck, soil sample from inside a U-haul, debris from a rear bumper of a U-haul and a paint sample from a trailer (TE, 206-207). She did a comparison of the exhibits and the soil from the bottom of Petitioner's shoe was an insufficient amount for comparison purposes and that the soil sample from inside the U-haul was different from soil samples around the truck (TE, 208-209). Ms. Wheeler's analysis of the debris taken from the rear of the truck trailer was

identical to the paint in the back of the U-haul, identical in color, type, layer structure and elemental composition, but she testified that she did not match the paint back to a specific origin (TE, 210-215).

The Commonwealth's next witness was Sarah Heckler, who does fingerprint identification. She testified that she performed a comparison of a latent print to a set of prints for the Petitioner and there was no match and the fingerprint that she had was definitely not the Petitioners (TE, 222-224).

The Commonwealth's next witness was Roger Heath. He testified he saw a U-haul truck two (2) times in the same day on the road on which he lives (TE, 228). Mr. Heath further testified that he saw it go to Mr. Goldson's house, however, he could not identify the Petitioner as the driver of truck (TE, 231).

The trial recommenced on Thursday, March 21, 1985.

The next Commonwealth witness was Oma Lee Claunch. He related that he spoke to a sheriff on August 1, 1984 regarding a U-haul truck on Elrod Road (TE, 247). Mr. Claunch said that he saw the driver but he could not identify the Petitioner as the person driving the truck (TE, 248-251).

The next Commonwealth witness was Billy Price. He testified that he saw a U-haul truck on Elrod Road, but he could not identify the Petitioner as the driver (TE, 262-264).

The next Commonwealth witness was Potter Langdon of Blue John Road, Pulaski County, Kentucky.

He related that he saw a U-haul truck go down the road, and come back, but he could not identify the Petitioner as the driver (TE, 272-274).

The next Commonwealth witness was Russell Goff, a deputy sheriff of Pulaski County, Kentucky. Mr. Goff testified that he became involved in the investigation from reports of a tractor trailer parked off Elrod Road and a U-haul making trips back and forth from it (TE, 281). The license number of the tractor trailer was run through a computer, and it came back stolen. *Id.* The Ford tractor was found nearby in a clump of trees (TE, 282). The tractor was also found to be stolen (TE, 282). Two (2) tractors were found at Goldson's house, and they were found to be stolen (TE, 285).

The next witness was Sarah Goldson, the wife of Jim Goldson. She stated that she saw a vehicle which looked like a U-haul outside her house (TE, 302-304).

The Pulaski County Sheriff, John Adams, stated that he computed the miles on the U-haul truck to see if it matched the distance he believed the truck had traveled (TE, 310-311). He read the Petitioner his rights (TE, 313). He also identified the Ford tractor key (TE, 317-318).

The Commonwealth then called several witnesses who testified as to the chain of evidence concerning items which were taken into evidence during the course of their investigation (TE, 335-354).

The Commonwealth then called Ronnie Freels of the Kentucky State Police Crime Lab. He testified

that he received athletic shoes and a plaster cast from Detective McWhorter and that he could not say that the Petitioner's right shoe made the impression and he could not say beyond a reasonable doubt that the Petitioner's right shoe made the imprint in the impression (TE, 355-370).

The Commonwealth then called one other witness to establish a chain of custody concerning a Ford tractor key and the Commonwealth then closed (TE, 376).

The Petitioner then moved for a directed verdict, which was overruled and then Petitioner presented his case by calling to the stand Officer Kenneth Upchurch (TE, 377). The Defendant then closed his case and one again moved for a directed verdict (TE, 379-380).

At 4:35 p.m., the case was submitted to the jury and at 5:05 p.m., the jury returned a verdict convicting the Petitioner of Receiving Stolen Property over $100.00 and recommended a maximum five (5) year penalty (TE, 433).

The Petitioner's trial as a Persistent Felony Offender then began.

Prior to any evidence being presented, the Petitioner moved the Court to not permit the Commonwealth to introduce hearsay evidence to prove the charge of Persistent Felony Offender (TE, 435-436).

The Court then admonished the Commonwealth to use admissible evidence (TE, 437). The Commonwealth then moved for a continuance of the Persistent Felony Offender phase, implicitly (if not expressly)

admitting it was unprepared to prove the Persistent Felony Offender phase at that time (Appendix, hereinafter A, 11). Then the Court overruled the motion for a continuance and the Commonwealth started the Persistent Felony Offender trial with neither the judgment of conviction from Hardin County, Kentucky nor a subpoena for any witness from Hardin County, Kentucky (TE, 438; A, 11).

The Commonwealth then called Detective Mike Walters who testified that he processed the Petitioner on the day of his arrest and that the Petitioner's Date of Birth was May 3, 1945 and his Social Security Number was 404-60-9260 (TE, 441).

The Commonwealth then called Anne Dick, a probation and parole officer for the 28th Judicial District (Pulaski County, Kentucky) (TE, 441).

Over the Petitioner's continued objection to the inadmissibility of the evidence, Ms. Dick testified from the records of probation and parole (not from the certified copies of conviction itself), that the Petitioner was convicted in Hardin County, Kentucky of Attempt to Commit Robbery in the First Degree and that the Petitioner was formally sentenced to six (6) imprisonment on April 26, 1976 (TE, 443). On cross-examination, Ms. Dick admitted that she was not the custodian of the record from which she was testifying and that obtained all of her information from a telephone call with a probation and parole officer in Hardin County, Kentucky (TE, 445).

The Petitioner then moved for a directed verdict from the Persistent Felony Offender trial and the motion was overruled (TE, 446).

The jury then convicted the Petitioner of being a Persistent Felony Offender in the Second Degree and assessed a ten (10) year sentence (TE, 451).

The Petitioner then moved the Court to grant him a new trial from the Persistent Felony Offender conviction (TR, 36). The Commonwealth joined in the Defendant's post-trial motion for a new trial (A, 11). The Court with the concurrence of the Commonwealth granted a new trial on the Persistent Felony Offense (TE, 456).

The Petitioner then moved the Court to dismiss the Persistent Felony Offender indictment for the following reasons:

1. The Court improperly denied the Defendant's motion for directive verdict upon completion of proof of the Commonwealth's case.
2. The Court, in a prior ruling, sustained the Defendant's motion for a new trial based on the fact that the evidence heard on this indictment was not properly admitted and that said testimony was hearsay evidence.
3. To re-try the Defendant on the above charge would be placing the Defendant in jeopardy twice for the same offense in violation of the Constitution of the Comonwealth of Kentucky

and the Constitution of the United States of America (TR, 39).

On June 3, 1985, the Persistent Felony Offender was re-tried over the Petitioner's objection. The Commonwealth called Ms. Anne Dick and she testified that the Petitioner was found guilty of Receiving Stolen Property over $100.00 and received a five (5) year prison term (TE, 469).

The Commonwealth then called Walter Butler, probation and parole officer from Hardin County, Kentucky, and he related that he could identify the Petitioner; that the Petitioner was convicted of Attempt to Commit Robbery and received a six (6) year sentence; that the Petitioner was shock probated on October 27, 1977 and the period of probation expired on October 23, 1982; the date of the offense was January 6, 1974 and the Petitioner's Date of Birth was May 3, 1945 (TE, 474-476).

The Petitioner then moved for a directed verdict (TE, 481).

The jury then returned a verdict convicting the Petitioner of being a Persistent Felony Offender in the Second Degree and sentenced him to ten (10) years (TE, 496).

Final judgment was entered on June 3, 1985 (TR, 45-47).

The Petitioner then appealed his Persistent Felony conviction to the Court of Appeals of Kentucky and

argued that his Persistent Felony Offender conviction violated Section 13 of the Kentucky Constitution and the Fifth Amendment of the United States Constitution. The Court of Appeals of Kentucky reversed the Petitioner's Persistent Felony Offender conviction with directions that an order be entered dismissing the indictment and remanded the Petitioner's conviction for Receiving Stolen Property over $100.00 for final judgment (A, 5). The Court of Appeals of Kentucky in reversing the Petitioner's Persistent Felony Offender conviction compared the present to *Burks* v. *United States,* 437 U. S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) and *Hudson* v. *State of Louisiana,* 450 U. S. 40, 101 S. Ct. 970, 67 L. Ed. 30 (1981) (A, 3). The Court of Appeals of Kentucky stated that the trial court was in error in treating the admission of hearsay evidence as a trial error rather than insufficient evidence (A, 4).

The Commonwealth then moved the Kentucky Supreme Court for discretionary review of the lower appellate courts decision. The Commonwealth urged that the Court of Appeals of Kentucky misconstrued *Hudson* v. *Louisiana, supra,* and did not follow precedent of the Kentucky Supreme Court.

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review. It then reversed the opinion of the Court of Appeals of Kentucky in *Commonwealth* v. *Mattingly,* Supreme Court Docket No. 86-SC-288-DG, — S. W. — (1986).

REASONS FOR GRANTING THE WRIT

I.

The Present Case Presents This Court with the Opportunity to Finally Decide a Fundamentally Important Question of Constitutional Law Which This Court Left Open in *Greene* v. *Massey*.

The question before this Court is whether the double jeopardy clause prohibits retrial when an appellate court reverses a conviction for the erroneous admission of evidence and the remaining is found to be insufficient to support the conviction.

KRS 532.080(2) states that "Persistent Felony Offender is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony . . . provided that:

> (a) That a sentence to a term of imprisonment one (1) year or more . . . was imposed therefore; and
>
> (c) That the offender:
>
> (3) was discharged from probation . . . on of the previous felony convictions prior to the date of commission of the felony for which he now stands convicted."

The Commonwealth at the Petitioner's trial over the Petitioner's objection and after having been admonished by the trial court to use admissible evidence, introduced *only* the incompetent hearsay evidence of Ms. Dick.

The Kentucky Supreme Court acknowledged that the testimony used to establish a persistent felony conviction was hearsay and that the Commonwealth knew that it was unprepared to prove the persistent felony offender conviction by competent evidence (A, 6-7, 11). Accordingly, there was no competent evidence of two essential elements to convict a persistent felony offender. KRS 532.080(2)(a) and KRS 532.080(2)(c)(3). However, the Kentucky Supreme Court, over the strong dissent of Justice Leibson, has concluded that the Petitioner's second Persistent Felony Offender trial was permissible.

The Petitioner asserts that the only constitutionally permissible remedy is the dismissal of the Persistent Felony Offender Indictment, not retrial. The applicable decisions of this Court are *Burks* v. *United States,* 437 U. S. 1 (1978) and *Greene* v. *Massey,* 437 U. S. 19 (1978). In Burks this Court stated that for the purposes of determining whether the double jeopardy clause precludes a second trial after the reversal of a conviction, reversal based on the insufficiency of evidence is to be distinguished from the reversal for trial error. The Court noted that "reversal for trial error, as distinguished from evidentiary sufficiency, does not constitute a decision that the government failed to prove its case." 437 U. S. at 15. More importantly, this Court went on to state that in cases "when a conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain

of prejudice for it has been given one fair opportunity to offer whatever proof it could assemble." 437 U. S. at 16.

The *Burks* double jeopardy bar against retrial after a finding of insufficient evidence was extended to the states in *Greene*. Most significantly, this Court specifically reserved judgment on whether retrial would be permissible if an appellate court found certain evidence to be incompetent and the remaining proof was insufficient to permit a jury to convict. 437 U. S. at 26 n. 9. That is the precise issue now facing this Court.

The Kentucky Supreme Court noted in *Mattingly* that the testimony used to establish the prior conviction of felony in the Persistent Felony Offender charge was erroneously admitted into evidence because it was hearsay (A, 6-7). However, the Kentucky Supreme Court refused to acknowledge that absent the incompetent evidence there was *no* proof competent to convict. The Kentucky Supreme Court cited *Burks* but stated that it held:

> that a reversal for a trial error which incorrectly admitted incompetent evidence does not constitute a decision that the government has failed to prove its case (A, 7).

The Kentucky Court labeled the issue here as one of trial error rather than evidentiary insufficiency. The Petitioner asserts that this in constitutional error by the Kentucky Supreme Court.

The Kentucky Court's rationale is that the Commonwealth should have a second opportunity to present new evidence to a jury because this was mere trial error. The Commonwealth had every opportunity to introduce the necessary of the elements of Persistent Felony Offender at Petitioner's first trial. With a modicum of preparation it could have produced attested copies of the indictment and convictions or called the circuit clerk or probation officer from Hardin County, Kentucky to testify from the originals. CR 44.01; KRS 422.050(5); *Stewart* v. *Commonwealth,* 479 S. W. 2d 23, 27 (Ky. 1972). However, the prosecutor knowing he was unprepared, elected to proceed without any competent proof. "The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks,* 437 U. S. at 11. The fundamental principal underlying *Burks,* is that the prosecution is entitled to one, and only one, full and fair opportunity to convict the Petitioner. When the government has failed to present constitutionally competent evidence, it cannot complain of unfairness in being denied a second chance. The Kentucky Supreme Court has ordered precisely what the double jeopardy clause prohibits and the Kentucky Court's rational is in contravention of the underlying policy of the double jeopardy clause.

The Kentucky Court's decision which permits a prosecutor to knowingly and intelligently utilize in-

competent evidence to cover up constitutional defects with the obvious intent of then curing the defect through a retrial the triumph of form over substance and is against logic and public policy. A prosecutor who chooses to ignore the simple, straightforward methods of proof should not be afforded "the proverbial 'second bite at the apple'." *Burks,* 437 U. S. at 17. This Court should not allow and encourage such prosecutorial tactics.

II.

The Opinion Below Conflicts with the Rationale of Prior Decisions of This Court, Including *Burks* v. *United States, Hudson* v. *Louisiana,* and *Greene* v. *Massey,* and There is a Split Among the Federal and State Courts on the Question Left Open in *Greene.*

The United States Court of Appeals for the Fifth Circuit has decided a case directly on point. Defendant Bullard was found to be an habitual offender after the state of Texas introduced proof that he had two prior convictions. *Bullard* v. *Estelle,* 665 F. 2d 1347, 1349 (5th Cir. 1982), *vacated and remanded,* 459 U. S. 1139 (1983).[1] The Texas Court of Criminal Appeals determined that there was insufficient proof that Bullard was the offender who committed one of the previous crimes and ordered a new trial. *Id.* at 1349-1350. The state proved identity of names but did

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[1]This Court remanded for consideration of whether the Texas constitution as recently interpreted by the Texas Court of Criminal Appeals provided Bullard relief on grounds independent of the United States Constitution.

not offer evidence such as fingerprints deemed acceptable by the appellate court as absolute identification. *Id.* at 1350 nn. 3-4. Bullard challenged the state's ability to retry him based on the double jeopardy clause, and the Fifth Circuit agreed that he should not be retried. *Id.* at 1357.

Significantly for Mattingly, the Fifth Circuit recognized the threshold question "is whether the failure of the state to prove, by *any* acceptable method, that Bullard was the person who committed one of two alleged prior offenses is an 'insufficiency of the evidence' error as opposed to a 'trial error'." *Id.* at 1358-1359; (emphasis the court's). The Fifth Circuit held that this was an insufficiency error. Likewise, in Petitioner's case where the Commonwealth introduced only incompetent proof of the dates of the prior offenses, in spite of the established law on proving such facts, the issue on appeal is one of insufficiency of the evidence and retrial is prohibited. "Nothing in *Burks* suggests . . . that double jeopardy protections are violated only when the prosecution has adduced no evidence at all of the crime or an element thereof." *Hudson* v. *Louisiana,* 450 U. S. 40, 43 (1981).

The *Bullard* court's reasoning is consistent with the rationale of *Burks, Greene* and *Hudson.*

In another persuasive decision, the United States Court of Appeals for the Second Circuit in *Graham* v. *Smith,* 602 F. 2d 1078 (2nd Cir. 1979) noted that a New York appellate court in reversing Graham's con-

viction because of the improper admission of a confession and evidence that was the fruit of it, had observed that the remaining evidence "was insufficient to warrant conviction of second degree murder." *Id.* at 1079. That Court modified the judgment to convict Graham of first degree manslaughter. *Id.* Graham sought a writ of habeas corpus which the Second Circuit granted, and the state retried him for second degree murder. The Second Circuit in its opinion emphasized:

> While our opinion did not specify for what crime Graham was to be retried, an issue not discussed in the briefs, we scarcely supposed that, quite apart from *considerations of double jeopardy,* the county prosecutor would seek to retry Graham on a charge for which the Appellate Division had held there was no adequate *admissible evidence.* . . . *Id.* at 1080; (emphasis added).

See also *State* v. *Robey,* 577 P. 2d 1226, 1230 (Mont. 1978) and *State* v. *Johnson,* 580 P. 2d 1387, 1390 (Mont. 1978.) The Montana Supreme Court ordered the indictments dismissed in each case since the *admissible* evidence was insufficient to support the conviction.

The United States Court of Appeals for the Seventh Circuit and the Ninth Circuit have, however, reached the question reserved in *Greene* and held in each case that a new trial is permissible where the evidence remaining once particular proof is held incompetent is insufficient. *United States* v. *Tranowski,* 702 F. 2d 668 (7th Cir. 1983); *United States* v. *Harmon,* 632 F. 2d

812 (9th Cir. 1980). The Court in *Tranowski* noted that this court "expressly left open the question whether it would be a bar if the remaining evidence was insufficient." *Id.* at 671. The Court in *Harmon* was faced with a situation in which the appellant contended that sufficiency of the properly admitted evidence should be examined, and retrial should be barred if the admissible evidence was insufficient to prove guilt. The Court noted that "The Supreme Court expressly reserved this question in *Greene*. *Harmon* at 814. Both Courts allowed retrial of the appellants because they were primarily concerned the contrary holding would cause prosecutors to "overtry" their cases lest retrial be prohibited because of the introduction of inadmissible proof. *Tranowski* and *Harmon* are clearly distinguishable from the present case. In this case, there was *no* competent proof offered by the Commonwealth to sustain a Persistent Felony Offender conviction.

The conflict among the state and federal courts on the question left open in *Greene* is that an especially important reason for this Court to grant review of this compelling fundamentally important constitutional question.

CONCLUSION

The present case presents the compelling, as of yet unresolved, fundamental constitutional question of whether the indictment must be dismissed when the *only* evidence offered to prove an essential elements of

an offense is incompetent. This question has been left open by this Court for many years, and the administration of justice would benefit from its final resolution. The decision below conflicts with the rationale of prior decisions of this Court, and there is a split among the state and federal courts about the answer to the question left unanswered in *Greene*. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, James L. Pate and Roger T. Rigney, counsel for Petitioner, hereby certify that the attached Petition for Writ of Certiorari, was served on Respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on February 17, 1987, addressed to Respondent's counsel, Mr. Joseph R. Johnson, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601-3494.

James L. Pate

JAMES L. PATE
Member, Bar of the Supreme
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APPENDIX

OPINION RENDERED: APRIL 4, 1986; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 85-CA-2211-MR

MICHAEL L. MATTINGLY - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Pulaski Circuit Court
Honorable Daniel J. Venters, Judge
Action Nos. 34-CR-152-1 & 84-CR-197

REVERSING IN PART—REMANDING IN PART

BEFORE: COMBS, DUNN and HOWARD, Judges.

COMBS, JUDGE. This is an appeal from a judgment of the Pulaski Circuit Court, convicting appellant of knowingly receiving stolen property and of being a second-degree persistent felony offender.

In seeking reversal of his receiving stolen property conviction, appellant alleges numerous trial errors which we will not go into at this time for reasons hereinafter stated. Appellant argues that his persistent felony offender conviction violates the double jeopardy provisions of §13 of the Kentucky Constitution and the fifth amendment to the federal constitution. We agree, and for that reason reverse his conviction and remand this case to the trial court for further proceedings on the underlying conviction.

At appellant's persistent felony offender trial, the only evidence introduced identifying appellant as the same individual who was previously convicted in the Hardin Circuit Court was a certified copy of the prior conviction and the testimony of his parole officer for the Pulaski Circuit Court. This witness had obtained that information from a telephone conversation with the Hardin Circuit Court probation officer. Appellant objected to this testimony at trial and unsuccessfully moved the court for a directed verdict following the Commonwealth's case and at the conclusion of the entire case.

Thereafter, appellant filed a motion for new trial which the court sustained. Prior to the second trial, appellant filed a motion to dismiss the persistent felony offender indictment stating:

(1) The court improperly denied his motion for directed verdict;

(2) The court's ruling sustaining his motion for a new trial was based on the fact that the evidence had not been properly admitted because of being hearsay; and

(3) To retry the defendant on the above charge would be placing the defendant in jeopardy twice for the same offense in violation of the Constitution of the Commonwealth of Kentucky and of the Constitution of the United States of America.

The court overruled the motion. At the second trial, probation officers for the Pulaski Circuit Court and the Hardin Circuit Court testified from their records and identified appellant as being the same person previously convicted of a felony in Hardin County. The court again overruled appellant's motion for a directed verdict at the conclusion of the Commonwealth's case and at the close of all

the evidence. The jury found appellant guilty of being a second-degree persistent felony offender and enhanced his sentence to ten years' imprisonment.

At one time, there was a split of authority as to whether or not an accused was entitled to plead double jeopardy after he had sought and obtained a new trial. This dichotomy was finally put to rest by Chief Justice Burger in *Burks* v. *United States,* 437 U. S. 1, 17, 18, 98 S. Ct. 2141, 2150, 57 L. Ed. 2d 1, 13 (1978), as follows:

> In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial. (Citations omitted.) . . . . . [O]nce the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

Following the *Burks* decision, the Supreme Court decided *Hudson* v. *State of Louisiana,* 450 U. S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981), which is similar to the case sub judice. After *Hudson* was found guilty of murder, the trial court granted a new trial because the evidence was insufficient to sustain the charge. At the second trial, the state corrected the evidentiary defect through eyewitness testimony. *Hudson* was convicted a second time and his conviction was affirmed by the Supreme Court of Louisiana. In reversing on double jeopardy grounds, the United States Supreme Court said:

> Our decision in *Burks* controls this case, for it is clear that petitioner moved for a new trial on the ground that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground.

In overruling appellant's motion for directed verdict, the trial court treated the admission of the hearsay evidence as a trial error rather than insufficient evidence. This was error. In *Hon* v. *Commonwealth,* Ky., 670 S. W. 2d 851, 853 (1984), the Kentucky Supreme Court reversed a persistent felony offender conviction, stating:

> When a conviction is reversed on appeal because the evidence at trial was insufficient to sustain a verdict of guilty, a retrial would, in effect, constitute double jeopardy. *Burks* v. *United States,* 437 U. S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *Hobbs* v. *Commonwealth,* Ky., 655 S. W. 2d 472 (1983); *Crawley* v. *Kunzman,* Ky., 585 S. W. 2d 387 (1979).

We note that appellant has not been sentenced on the receiving stolen property conviction as required by RCr 11.04 and we do not have a final judgment before us on that offense. For that reason, we remand this case for further proceedings.

In *Smith* v. *Commonwealth,* 289 Ky. 257, 258; 158 S. W. 2d 393 (1942), the Court considered a similar question, stating:

> Since the order book discloses the return of the verdict and the contents of the verdict there is sufficient record evidence to justify the entry of a judgment nunc pro tunc. *Thereafter, the appellants may appeal and, if they so desire, utilize for that purpose the record now filed in this Court.* [Emphasis added].

The judgment convicting appellant as a second-degree persistent felony offender is hereby reversed with directions that an order be entered dismissing the indictment as to that offense. The knowingly receiving stolen property case is hereby remanded for entry of final judgment imposing the sentence pursuant thereto.

ALL CONCUR.

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RENDERED: DECEMBER 18, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-288-DG

COMMONWEALTH OF KENTUCKY - - - - *Movant*

v.

MICHAEL L. MATTINGLY - - - - *Respondent*

On Review From Court of Appeals
No. 85-CA-2211-MR
(Pulaski Circuit Court Nos. 84-CR-152-1 and 197)

OPINION OF THE COURT BY JUSTICE VANCE REVERSING AND REMANDING

The question is whether the reversal of a judgment of conviction on the ground that the only evidence sufficient to sustain the conviction was erroneously admitted prohibits a retrial on grounds of double jeopardy.

Respondent was convicted of knowingly receiving stolen property valued in excess of $100.00, and his sentence was enhanced as a second-degree persistent felon. The testimony used to establish the prior conviction of felony on the persistent felony offender charge was erroneously admitted in evidence because it was hearsay. Because of that fact, the respondent's motion for a new trial was sustained as to the conviction as a persistent felony offender. On retrial, respondent was again convicted.

The Court of Appeals, relying upon *Burks* v. *United States,* 437 U. S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978);

Hudson v. *State of Louisiana,* 450 U. S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); and *Hon.* v. *Commonwealth,* Ky., 670 S. W. 2d 851 (1984), reversed the conviction on the ground that the evidence at the first trial was legally insufficient to sustain the conviction and that the retrial subjected the respondent to double jeopardy. We granted discretionary review and now reverse the decision of the Court of Appeals.

Burks v. *United States, supra,* held that when a conviction is reversed on appeal because the evidence at trial was not sufficient to sustain a verdict of guilt, the case cannot be remanded for a new trial but must be dismissed. Kentucky followed this holding in *Crawley* v. *Commonwealth,* Ky., 568 S. W. 2d 927 (1978).

Burks v. *United States, supra,* was careful to point out the distinction between a reversal for lack of evidence and a reversal for trial error. It held that a reversal for a trial error which incorrectly admitted incompetent evidence does not constitute a decision that the government has failed to prove its case. Rather, it is a determination that although the government did prove its case, it did so by evidence which was incompetent, and defendant is entitled to a new trial free of this procedural defect.

This court made the same distinction in *Hobbs* v. *Commonwealth,* Ky., 655 S. W. 2d 472 (1983). Therein we held that a reversal of a conviction by an appellate court on the ground that the only evidence to prove an essential element of guilt was erroneously admitted does not bar a remand for retrial.

In this case Anne Dick, a probation and parole officer, testified at the first trial with respect to the prior conviction as follows:

> Q. All right. Was Mr. Mattingly convicted in the Hardin Circuit Court?

A. Yes, sir, he was.

Q. And what was he convicted of?

A. He was convicted of attempt to commit robbery —first degree.

Q. Was he sentenced by the court on that charge?

A. Yes, sir, he was.

Q. What sentence did he receive?

A. On April 26, 1976 he was formally sentenced to the charge of attempt to commit robbery first degree and was sentenced to 6 years.

The foregoing testimony was admitted into evidence over objection of the respondent that it was hearsay. The respondent's objection was meritorious and the conviction was vacated because of the improper reception of this evidence. The admission of the evidence was a trial error. Nevertheless, it was admitted, and the jury was entitled to reach its verdict based upon all the testimony admitted into evidence.

Hon v. *Commonwealth, supra,* and *Hudson* v. *State of Louisiana, supra,* did not involve the improper admission of evidence which, when admitted, was sufficient to sustain the verdict. In each of those cases there was simply no evidence, improperly admitted or otherwise, which was sufficient to sustain the conviction. In this case there was sufficient evidence, albeit improperly admitted, to sustain the verdict. This is a case of a new trial granted because of a trial error, and the result is controlled by our decision in *Hobbs* v. *Commonwealth, supra.*

We note that respondent asserted various other trial errors on his appeal to the Court of Appeals which were not considered by that court in its opinion because of the reversal upon other grounds.

The decision of the Court of Appeals on the issue of double jeopardy is reversed, and the case is remanded to

the Court of Appeals for consideration of the other issues raised by respondent in the appeal to the Court of Appeals.

Stephens, C. J.; Gant; Stephenson; Vance; White; and Wintersheimer, J.J., concur. Leibson, J., dissents by separate attached opinion.

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MICHAEL L. MATTINGLY - - - - *Respondent*

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent.

At the persistent felony offender (PFO) phase of the first trial the Commonwealth proved the elements of the prior Hardin County conviction by testimony from a probation officer from Pulaski County. This probation officer was permitted to testify from information furnished to her in a telephone conversation with a parole officer from Hardin County. Because the Commonwealth knew this testimony was improper, the Commonwealth agreed that the PFO conviction should be set aside and a new trial granted. Then at the retrial of the PFO charge, the Commonwealth was prepared with competent evidence to convict.

The issue is whether the retrial was double jeopardy because the first conviction was obtained by insufficient evidence, as in *Hon v. Commonwealth*, Ky., 670 S. W. 2d 851 (1984), or whether the hearsay testimony, though incompetent, should be classified as "trial error," so that a retrial at which competent evidence was utilized was appropriate, as in *Hobbs* v. *Commonwealth*, Ky., 655 S. W. 2d 472 (1983).

The proof is overwhelming that the Commonwealth knew that it was unprepared to prove the PFO conviction by competent evidence at the first trial, and therefore had the Pulaski County probation officer make a telephone call back to Hardin County to obtain information about the previous conviction, and presented this obviously incompetent evidence as a "stop gap" measure:

1) The Commonwealth started the PFO trial with neither the judgment of conviction from Hardin County nor a subpoena for any witness from Hardin County.

2) Upon conviction of the defendant for receiving stolen property, the Commonwealth moved for a continuance of the PFO phase, implicitly (if not expressly) admitting it was unprepared to prove the PFO phase at that time.

3) The Commonwealth *joined* in the defendant's post-trial motion for a new trial, conceding error.

We should not condone the substance of a conviction when the Commonwealth started a trial with no proof to prove the elements of the offense, and then knowingly and intentionally utilized incompetent evidence to cover up the defect with the obvious intent of then curing the defect through a retrial.

This case should be treated as one where there was insufficient evidence to prove the previous conviction (as in *Hon*), and not as a case of "trial error" (as in *Hobbs*). We should not put our stamp of approval on the Commonwealth's transparent evasion of the *Hon* rule. This case is a triumph of form over substance.